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In The

Supreme Court of the United States

October Term, 1978

No. 78-345

JOHN MOATS and ROBERT J. ROCKWELL,

Petitioners,

vs.

LESLIE LANDRUM, Special Administratrix of the Estate of Roy Lee Landrum, Deceased,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the United States

From the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in *LANDRUM v. MOATS, et al.,* No. 77-11656, is reported at 576 F. 2d 1320. The Memorandum Opinion of the U. S. District Court for the District of Nebraska is at Appendix B of Petitioners' Brief.

Respondent opposes the granting of certiorari on the grounds that the judgment of the Eighth Circuit entered on May 30, 1978, is clearly correct with respect to its constitutional results and its interpretation of Neb. Rev. Stat. § 28-839. The granting of certiorari would only serve the purpose of rendering an advisory opinion and cause Respondent to suffer the burden of an unnecessary appeal.

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QUESTIONS PRESENTED FOR REVIEW

(1) Is the use of deadly force by a police officer against a nonviolent fleeing felon unreasonable per se, thereby violating the Fourth, Fifth and Fourteenth Amendment rights of the individual.

(2) Did the United States District Court for the District of Nebraska, and the Eighth Circuit Court clearly err in finding police officers to be encompassed by Neb. Rev. Stat. § 28-839.

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ARGUMENT

I. The Eighth Circuit's decision that a police officer's use of deadly force to arrest a nonviolent fleeing felon is unconstitutional is clearly correct and respondent ought not be burdened by unnecessary additional appeals.

A. The decision of the Eighth Circuit Court is clearly grounded upon a deprivation of constitutional rights separate and distinct from petitioners' violation of state law.

To recover under 42 U. S. C. § 1983, Plaintiff must show that an articulable, independent, constitutional right has been violated by the Defendant. See, e. g., *Jones v. Bombeck,* 375 F. 2d 737 (3d Cir. 1967); *Shaffer v. Jennings,* 314 F. Supp. 588 (E. D. Pa. 1970). A violation of state law or state created rights is not actionable under § 1983 unless Defendant's conduct also transgresses an independent constitutional right. *California v. LaRue,* 409 U. S. 109 (1972); *Miller v. Carson,* 563 F. 2d 757 (5th Cir. 1977); *Sauls v. Hutto,* 304 F. Supp. 124 (E. D. La. 1969).

The Eighth Circuit Court's decision, in the light of the governing principles of § 1983 litigation, shows that the Court found the use of deadly force, under the circumstances established by Plaintiff, to be constitutionally impermissible, but had stated that to recover under § 1983, Plaintiff must show violation of a specific, identifiable constitutional right. *Landrum v. Moats,* 576 F. 2d 1320, 1324 (8th Cir. 1978) (hereinafter cited Landrum). It found the right involved in this case to be the fundamental right to life. Id. at 1324. See also, *Mattis v. Schnarr,* 547 F. 2d 1007 (8th Cir. 1976), vacated, sub nom., *Ashcroft v. Mattis,* 431 U. S. 171 (1977) (hereinafter cited Mattis). The Court readopted the reasoning of its decision in *Mattis v. Schnarr,* that the right to life was fundamental and protected from unreasonable takings by the Due Process Clause of the Fourteenth Amendment.

Landrum, supra, at 1324 (citing *Mattis,* supra, at 1017-20).

The Court then proceeded to a discussion of Neb. Rev. Stat. § 28-839, the basis of Respondent's pendent state claim. *Landrum,* supra, at 1323-24, 1325-27.

The Court then addressed the question of available defenses in § 1983, noting that federal law not state law governed actions brought under § 1983. *Landrum,* supra, at 1327-28, N. 14-15.

A holding that violation of state law by police officers is unconstitutional per se, would conflict with prior holdings in the Eighth Circuit which have expressly rejected such a contention . *Sigler v. Lowrie,* 404 F. 2d 659 (8th Cir. 1968); *Mueller v. Powell,* 203 F.-2d 797 (8th Cir. 1953). Therefore, in light of the general rules governing § 1983 actions, the statements of the Court in *Landrum,* and precedents in the Eighth Circuit, it is clear that the decision reached by the Eighth Circuit was that the use of deadly force is constitutionally limited to the rules set forth in the Model Penal Code § 3.07, adopted as Neb. Rev. Stat. § 28-839. See, *Mattis v. Schnarr,* supra at 1020.

B. The use of deadly force to arrest a nonviolent fleeing felon is a deprivation of the victim's constitutional rights under the Fourth, Fifth and Fourteenth Amendments.

Although there are several different approaches to constitutional analysis of deadly force rules, two particular approaches seem most appropriate. See generally, COMMENT, DEADLY FORCE TO ARREST, TRIGGERING CONSTITUTIONAL REVIEW, 11 Harv. Civ. Rights—Civ. Lib. L. Rev. 361 (1976).

The Fourth Amendment controls on searches and seizures, see *Jenkins v. Averett,* 424 F. 2d 1228 (4th Cir. 1970) and substantive analysis under the Due Process Clause of the Fourteenth Amendment, see *Mattis v. Schnarr,* supra, Cf. *Roe v. Wade,* 410 U. S. 113 (1973).

The Fourth Amendment protects the individual from arbitrary and unreasonable interference by police officers, *Mapp v. Ohio,* 367 U. S. 643 (1961). This shield extends to citizens on the street, *Terry v. Ohio,* 392 U. S. 1 (1968), and protects the individual's physical integrity from arbitrarily inflicted injury. *Screws v. U. S.,* 325 U. S. 91 (1945); *Brazier v. Cherry,* 293 F. 2d 401 (5th Cir. 1961), cert. denied, 368 U. S. 921 (1961); *Jackson v. Martin,* 261 F. Supp. 902 (N. D. Miss. 1966). Brutality and conduct that "shocks the conscience" are prohibited by the strictures of the Fourth Amendment, see, e. g., *Jones v. Marshall,* 528 F. 2d 132 (2nd Cir. 1975), but the protections extend to considerably less gruesome police conduct. See, e. g., *Beck v. Ohio,* 379 U. S. 89 (1964).

For police conduct to be permissible under the Fourth Amendment, the power granted must be narrowly drawn and designed only to effectuate the pressing state need without undue intrusion on individual rights. *Terry v. Ohio,* 392 U. S. 1 (1968). Compare, *Sibron v. New York,* 392 U. S. 40 (1968).

Whatever state interests may be asserted by Petitioners, it is unquestionable that a deadly force rule extending to nonviolent fleeing felony *suspects* is not nar-

rowly drawn. Cf. *Jenkins v. Averett,* supra; *Carter v. Carlson,* 447 F. 2d 358 (D. C. Cir. 1971), rev'd on other grounds sub. nom., *District of Columbia v. Carter,* 409 U. S. 418 (1973), *Sauls v. Hutto,* supra.

Under a substantive due process analysis, once it is demonstrated that certain fundamental rights are involved, state rules which infringe these rights must be justified by a compelling state interest served by legislation narrowly drawn to express only the legitimate interests at stake. See, e. g., *Roe v. Wade,* 410 U. S. 113 (1973); *Moore v. City of East Cleveland,* 431 U. S. 494 (1977). See also, *Cleveland Board of Education v. LeFleur,* 414 U. S. 632 (1974). Again, whatever interests Petitioners may assert, it is clear that the use of deadly force to arrest any nonviolent fleeing felony suspect is not sufficiently narrow in scope. Such a rule encompasses within its ambit tax evaders, embezzlers, and teenagers smoking marijuana, as well as killers, kidnappers, and rapists.

Because there can be little doubt that the rule which results from the Eighth Circuit's holding in *Landrum* is the correct one, contra, *Jones v. Marshall,* 528 F. 2d 132 (2d Cir. 1975); *Wiley v. Memphis,* 548 F. 2d 1247 (6th Cir. 1977), cert. denied, 98 S. Ct. 65; *Cunningham v. Ellington,* 323 F. Supp. 1072 (W. D. Tenn. 1971); a review of the decision would be little more than an advisory opinion, Cf. *Chicago & So. Airlines v. Waterman S. S. Corp.,* 333 U. S. 103 (1948); *Rescue Army v. Municipal Court,* 331 U. S. 549 (1947); *Hayburn's* case, 2 Dall. 409 (1792), causing unnecessary burden and expense to Respondent. Therefore, certiorari ought to be denied.

II. The Eighth Circuit's interpretation of Neb. Rev. Stat. § 28-839, in view of the absence of any interpretation by the state's highest court or clear expressions of legislative intent, was reasonable and certiorari ought to be denied.

It is a clearly settled rule that where there is no decision by the state's highest court on a particular issue of state law, the federal court must apply what it finds to be the state law after giving due regard to all of the sources which the state's highest court would look to resolve the dispute. *Commissioner v. Estate of Bosch,* 387 U. S. 456 (1967); *Roginsky v. Richardson-Merril, Inc.,* 378 F. 2d 832, 851 (2nd Cir. 1967), see, Rules of Decision Act, 28 U. S. C. § 1652.

The Eighth Circuit reviewed the sources to which Petitioners refer in their Brief, Petitioner's Brief at 16, C-92, 93, 96, 97; with the language of the applicable statutes, Neb. Rev. Stat. § 28-833 (4), § 28-839 (3) (b) and determined that the use of the phrase "peace officer" in Neb. Rev. Stat. § 28-839 (3) (b) controlled over the general exclusion of law enforcement officers effected by Neb. Rev. Stat. § 28-833 (4). *Landrum v. Moats,* 576 F. 2d 1320, 1325-26 (8th Cir. 1978). (Set forth in Petitioner's Brief at B-3, 4).

Given the complete absence of legislative or state judicial guidance on the issue, the Eighth Circuit chose to let stand the judgment of the Federal District Court Judge who was more personally acquainted with Nebraska law and the methods of its courts. See, e. g., *Bernhardt v. Polygraphic Co.,* 350 U. S. 198 (1956); *Huddleston v. Dwyer,* 322 U. S. 232 (1944).

Given the historical trend towards strictly limiting the use of deadly force in law enforcement, see, generally, Justification for the Use of Force in the Criminal Law, 13 Stan. L. Rev. 566 (1961); the adoption of the Model Penal Code by the Nebraska Legislature, compare Model Penal Code § 3.07 with Neb. Rev. Stat. § 28-839, and the absence of state judicial or legislative guidance on the question, the decision of the Eighth Circuit is proper and reasonable.

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CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Philip M. Kneifl, one of the attorneys for Respondent, Leslie Landrum, Special Administratrix of the Estate of Roy Lee Landrum, Deceased, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of September, 1978, I served three (3) copies of the foregoing Respondent's Brief in Opposition on Mr. James E. Fellows and Mr. Timothy M. Kenny, Omaha/Douglas Civic Center, 1819 Farnam Street—Suite 804, Omaha, Nebraska 68102.

It is further certified that all parties required to be served, have been served.

/s/ PHILIP M. KNEIFL
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